KETUA PENGARAH HASIL DALAM NEGERI *a*

v.

DATO' HANIFAH NOORDIN

HIGH COURT MALAYA, KUALA LUMPUR *b*
FAIZA TAMBY CHIK J
[CASE STATED NO: R3-14-10-98]
15 DECEMBER 1999

REVENUE LAW: *Income Tax - Capital - Whether payments made to respondent capital or income - Burden of proof* *c*

The respondent was a partner in Ernst & Whinney ('E&W') in accordance with the terms and conditions of a partnership deed dated 1 September 1981. E&W merged with another firm effective 1 July 1990 but legal advice obtained confirmed that such merger could not be effected since three partners voted against the merger. The continuing partners on realising the illegality of the merger approached the dissenting partners with a request to retire under the terms of a settlement agreement dated 31 July 1990 to enable them to regularise the merger. *d*

The respondent was not entitled under the settlement agreement nor did he participate in any business activity of the new partnership. There was no consultancy agreement nor did the respondent offer any services to the new partnership. The respondent was paid certain sums of money, namely RM1,999,651 over 23 equal installments and an adjustment sum of RM20,262. *e*

These sums were paid in consideration of the respondent: (a) agreeing to cease as a partner on 31 July 1990; (b) losing all rights in the said partnership; (c) waiving all rights to challenge a merger between E&W and another firm; and (d) agreeing to refrain from taking any legal action in respect of the said merger. *f*

The issues for consideration were: (a) whether the sums paid to the respondent were 'income' or 'capital'; and (b) who had the burden to prove the nature of such. *g*

Held:

[1] How partners describe a payment does not decide or determine the nature of the payment; it is how the accounts are kept that is conclusive of the nature of the payment. *h*

[2] The payments received by the respondent were not related to any work done by him but solely for retiring from the partnership and agreeing to lose all his rights under the settlement agreement and to take no legal action against the partnership – and not to compete with the partnership. Based on the authorities, such payments were capital expenditure. *i*

[3] The onus was on the respondent to prove the nature of the payments. The respondent had in fact given evidence on the firm's accounts and had showed where they were incorrect. The appellant on the other hand had failed to call any witness to explain the correctness of the contents of the accounts. The respondent's evidence therefore remained unrebutted.

[Appeal dismissed.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd v. Chang Ching Chuen [1995] 3 CLJ 639 ***(refd)***
Bandar Utama City Corporation Sdn Bhd v. Director-General of Inland Revenue [1998] 4 AMR 3921 ***(refd)***
Barr, Crombie & Co Ltd v. Commissioners of Land Revenue 26 TC 406 ***(refd)***
Bernad v. Commissioners of Inland Revenue 13 TC 723 ***(refd)***
Bernherd v. CIR 13 TC 723 ***(refd)***
Bukit Yew Sdn Bhd v. Director General of Inland Revenue [1978] MLJ 379 ***(foll)***
Chibbett v. Joseph Robinson & Sons 9 TC ***(refd)***
Chua Lip Kong v. Director-General of Inland Revenue [1982] CLJ 398 ***(refd)***
Cohan's Executors v. The Commissioners of Inland Revenue 12 TC 602 ***(refd)***
Commissioner of Inland Revenue v. Wesleyan & General Assurance Society ***(foll)***
Comptroller-General of Inland Revenue v. T [1970] 2 MLJ 35 ***(refd)***
Daishowa (M) Wood Product Sdn Bhd v. Kepong Wood Products Co Sdn Bhd [1982] 2 MLJ 68 ***(refd)***
Director General v. Ee Sim Sai [1977] 2 MLJ 32 ***(refd)***
Director General of Inland Revenue v. HMP Ltd [1988] 1 MSTC 3032 ***(foll)***
Edwards (Inspector of Taxes) v. Bairstow & Anor [1956] AC 4 ***(refd)***
Ee Sim Sai [1997] MLJ 32 ***(refd)***
Gold Coast Selection Trust Ltd v. Hamphrey 30 TC 209 ***(refd)***
International Times & Ors v. Leong Ho Yuen [1980] 2 MLJ 86 ***(foll)***
London & Thames Haven Oil Wharnes Ltd v. Attwool, (HM Inspector of Taxes) 45 TC 491 ***(refd)***
Paget v. Commissioners of Inland Revenue 21 TC 677 ***(refd)***
Ryan v. Asia Mill Ltd 32 TC 275 ***(refd)***
St Aubyn Estates Ltd v. Strick (HM Inspector of Taxes) 17 TC 412 ***(refd)***
Sun Newspapers Ltd v. FC of T [1938] 16 CCR 337 ***(foll)***
Van Den Berghs Ltd v. Clark (HM Inspector of Taxes) Vol 19 TC 390 ***(foll)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

For the plaintiff - Haslina Hussain
For the respondent - Dr A Subramaniam; M/s Shook Lin & Bok

Reported by Mariette Peters-Goh

JUDGMENT

Faiza Tamby Chik J:

The issue in this case is whether the following sums are "income" or "capital" in the hands of the respondent:

(i) A sum of RM1,199,651 was paid to the respondent over 23 equal installments commencing on 31 August 1990, under a "Settlement Agreement" dated 31 July 1990;

(ii) In addition certain adjustments were made by the new partnership of Ernst and Young to a total of RM20,262 which sum was also taxed on the respondent;

It is observed that there is no loss of revenue to the Inland Revenue Board, since no deduction ought to have been given in the partnership accounts and that would mean that the individual partners of the new partnership of Ernst and Young would pay the tax. That should have been the correct procedure to adopt for the Inland Revenue Board upon the facts as found in the case stated.

The respondent submitted that:

(i) The sums paid to the respondent are capital consideration for retirement from the partnership owing to the change in the business framework or structure of the partnership in which they were partners, or in the alternative;

(ii) The sums paid to the respondent are withdrawal of capital in respect of goodwill upon retirement and, therefore, capital, or in the alternative;

(iii) The consideration received is for loss of rights under the partnership agreement dated 1 September 1981;

(iv) The consideration received is for all three factors above and, for refraining from competition and, therefore, are capital in nature;

(v) The payments are not consultancy payments. Clause 3 of the settlement agreement dated 31 July 1990 cannot determine the tax liability of the respondent. That is for the court to decide, not for taxpayers.

Briefly the facts are that the respondent was a partner in Ernst and Whinney in accordance with the terms and conditions of a Partnership Deed dated 1 September 1981. Ernst and Whinney merged with another firm effective from 1 July 1990. Legal advice obtained confirmed that the merger could not be effected since three partners voted against the merger. Therefore, the merger which was effected on 1 July 1990 was illegal. The continuing partners on realising the illegality of the merger approached the dissenting partners with a request to retire under the terms of a settlement agreement dated 31 July

1990 to enable them to regularise the merger. A new partnership, named Ernst and Young came into existence on 1 July 1990, and therefore, the whole structure of the business was changed. The respondent was not entitled nor participated under the settlement agreement in any business activity of the new partnership. There was no consultancy agreement pursuant to cl. 3 of the settlement agreement dated 31 July 1990, nor did the respondent offer any services to the new partnership.

The compensation payments provided under the settlement agreement were predetermined, based on 1.5 times the firm's 1989 profits, and had no co-relation to the profits of year of assessment 1991 and 1992 of the firm. Besides the payment were made in 23 equal installments concluding on 30 June 1992. Not being partner in those years, they were not calculated by reference to the profit sharing points structure used to determine the profit share of other partners in those years in question, and therefore, the sums paid are capital compensation for consideration of the respondent:

(i) agreeing to cease as a partner on 31 July 1990;

(ii) loosing all rights in the said partnership;

(iii) waiving all rights to challenge a merger between Ernst and Whinney and another firm, and

(iv) agreeing to refrain from taking any legal action in respect of the said merger in item (ii) above.

The following sums were received by the respondent:

(i) Compensation paid was RM1,199,651 paid over 23 equal installments commencing on 31 August 1990 and concluding on 30 June 1992;

(ii) In addition – certain adjustments were purported to be made by the partnership of Ernst and Young as follows:

Nature of non-tax adjustments	**RM**
Capital Allowance	– 11,570.00
Donations	– 381.00
Other timing differences and non Deductible items	
	+ 32,213.00
Total	+ 20,262.00

These adjustments by the partnership of Ernst and Young had nothing to do with the respondent since he retired from the partnership on 31 July 1990 and was not a partner in the new partnership of Ernst and Young.

The total sum received by respondent Dato' Hanifah bin Noordin was RM1,219,913 (RMl,199,651 + RM20,262) and was assessed on him, as follows:

Year of Assess-ment	Date of Notice	Assessed Income In Relation to Partnership	Capital Receipt Included in Assessed Income	Tax on Capital Receipt In Dispute
1991	31.12.91 & 16.12.92	773,625.00	282,642.00	107,403.02
1992	01.05.95	1,015,830.00	937,271.00	346,790.00
1991 & 1992	Seperti di atas	1,789,455.00	1,219,194.00	454,194.00

The respondent submitted that when the new partnership came into effect on 1 July 1990, the respondent's framework of business ceased since he was no longer a partner in the new partnership. In *Van Den Berghs Ltd. v. Clark (H.M. Inspector of Taxes)* Vol. 19, TC 390, Lord Macmillan said at p. 431:

> Now what were the Appellants giving up? They gave up their whole rights under the agreements for thirteen years ahead. These agreements are called in the Stated Case "pooling agreements", but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the Appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years, the lump sum might be regarded as of the same nature as the ingredients of which it was composed. But even if a payment is measured by annual receipts, it is not necessarily in itself an item of income. As Lord Buckmaster pointed out in the case of the *Glenboig Union Fireclay Co, Ltd v. Commissioners of Inland Revenue* (1): "There is no relation between the "measure" that is used for the purpose of calculating a particular "result" and the quality of the figure that is arrived at by means of "the application of that test."

Similarly, in this case the respondent under the settlement agreement dated 31 July 1990 agreed to give up all rights in the partnership, and therefore, the payments received are capital. Under para. 4 of the settlement agreement, the respondent agreed "to have no claim on the income of the various partnerships of Ernst and Whinney and the new partnership of Ernst & Young". Under para. 3 of the settlement agreement it is stated that the 23 equal installments will be entered into the book as consultancy payments to

get a tax deduction for the partnership. It is settled law that how parties describe a payment does not decide or determine the nature of payment. In *Director General of Inland Revenue v. HMP Ltd.* [1988] 1 MSTC 3032, at p. 3037 where the Supreme Court said:

> It is the contention of the respondent that there is no question of gift or boon or gratuitous or discretionary payment. The payment is based on profitability. Payments to the two categories of the staff are so distinct that the respondent submits that the payment to the managerial staff is endowed with all the clear characteristics of a commission and not that of a bonus. On the other hand, appellant relied on the fact that the term used in the incentive scheme refers to it as a "bonus scheme". The Special Commissioners were aware of this but they were quick to remind themselves that "the label itself is not conclusive".

It is also settled law that how the accounts are kept is not conclusive of the nature of a payment. (*Bukit Yew Sdn. Bhd. v. Director General of Inland Revenue* [1978] 379; *Bernad v. Commissioners of Inland Revenue* 13 TC 723. *Gold Coast Selection Trust Ltd. v. Hamphrey* 30 TC 209).

The fact remains that the respondent:

(i) did not participate in the new or old partnership after 31 July 1990;

(ii) did not execute any consultancy agreement with the new or old partnership;

(iii) did not do any consultancy work for the new or old partnership:

(iv) was under a legal obligation not to compete with the old or new partnership (para. 9, settlement agreement dated 31 July 1990).

and therefore, the payments were not related to any work done by the respondent but solely for retiring from the partnership and agreeing to lose all his rights under the partnership agreement and take no legal action against the partnership, and not to compete with the partnership. Payments made to stop competition were held capital expenditure in *Sun Newspapers Ltd. v. F.C. of T* [1938] 16 CCR 337, and thus, in this case the payments could not be a distribution of profits of the new partnership to partners of the old partnership and who were not partners in the new partnership. The respondent gave up 17 years of profit and rights.

The respondent played key roles in the development of the business and goodwill of the partnership for many years and his retirement payments were capital withdrawn. The respondent contributed capital towards the partnership. (See respondent's bundle of documents, exh. C, p. 12). In *Cohan's Executors v. The Commissioners of Inland Revenue,* 12 TC 602, although the facts are very different, the principle that emerged was that where, in that case, the executors did not continue to carry on the business of the deceased in the partnership, the gain accruing is "merely realising the

deceased's estate to the best advantage". Likewise, in the instant case, the appellant did not continue with the partnership business after his retirement on 31 July 1990 and, therefore the sum received is a realisation of his asset in the partnership. In the instant case the respondent lost all rights under the partnership agreement dated 1 September 1981. This is clear from the terms of the settlement agreement dated 31 July 1990 which are as follows:

(i) Paragraph 11 of the said settlement agreement bars the respondent to take legal action against the old partnership;

(ii) Paragraph 4 of the said settlement agreement bars the respondent to any claim on the income of the various partnerships;

(iii) Paragraph 9 bars the respondent from competing with the partnership or the new partnership.

The case of *Van Den Berg (supra)* is illustrative of the principle of loss of rights, and compensation thereof, is capital. On p. 432 of the Report Lord Macmillan said:

> Mr. Hills very properly warned your Lordships against being misled as to the legal character of the payment by its magnitude, for magnitude is a relative term and we are dealing with companies which think in millions. But the magnitude of a transaction is not an entirely irrelevant consideration. The legal distinction between a repair and a renewal may be influenced by the expense involved. In the present case, however, it is not the largeness of the sum that is important but the nature of the asset that was surrendered. In my opinion that asset, the congeries of rights which the Appellants enjoyed under the agreements and which for a price they surrendered, was a capital asset.

In *Paget v. Commissioners of Inland Revenue* 21TC 677:

> The question now to be determined is whether the gross sums received by Miss Paget during the year ending 5th April, 1933, from the sale of coupons of the City of Budapest bonds, and the gross sums received by her during the year ending 5th April, 1934, from the sale of coupons of those bonds and the sale of coupons of the bonds of Jugoslavia respectively, form part of her total income from all sources for those two years, so as to render her liable to be assed for Sur-tax in respect of them. The Special Commissioners decided this question in favour of the Crown in relation to the Budapest bonds and in favour of Miss Paget in relation to the Jugoslavia bonds. An appeal by the Crown and a cross-appeal by Miss Paget were taken to Finlay, J, who decided both in favour of Miss Paget. From his decision an appeal to this Court has been brought by the Crown in both cases and these appeals now fall to be determined.

Lord Romer held on p. 699:

> In these circumstances, the only question to be decided is whether the proceeds of sale of a right to receive income in the future can be treated as income for the purpose of the Income Tax Acts. The question thus broadly stated plainly admits of but one answer, and that answer must be in the negative. The

> proceeds of the sale for a lump sum of an annuity, for instance, are capital in the hands of the vendor and not income. And this is true even when the subject of the sale is not the annuity for its whole duration, but the right to be paid the annuity for a number of years, or even for one year. Nor is it any the less true because the purchaser will pay less for an annuity that will be subject to deduction of Income Tax in his hands than he would pay for a tax free annuity. Nor is it any the less true because in many cases the net income when paid to the purchaser is not income in his hands. In the case, for instance, of a man carrying on the business of dealing in coupons, the sum collected by him on cashing a coupon will be merely a trade receipt and not income. Tax may have been deducted on payment of the coupon, but for Sur-tax purposes the interest represented by the coupon cannot be regarded as forming part of the total income of anybody. This is a position that frequently occurs. The net income received by a trustee under a trust for accumulation of income is a case in point. But it is easy to conceive cases which, while appearing at first sight to be sales for money or money's worth of a right to receive income in the future, are not in reality sales at all. If a man possessed of a coupon representing interest payable under deduction of tax hands it to his tailor as a convenient method of paying for a suit of clothes, the tailor, when cashing the coupon, may well be considered as doing so on behalf of his customer, and then paying himself out of the proceeds. The customer in such a case could not avoid returning the gross amount of the interest as part of his total income for Sur-tax purposes. If, on the other hand, the tailor were to accept the coupon in full discharge of his account, the interest that it represents would not, when paid, be income of the customer. Still less would the suit of clothes form part of his income. In the present case there is nothing to suggest that the transactions between Miss Paget and the coupon dealers merely constituted them her agents for collecting the interest on her bonds, even though, as was probably the case, they did in fact collect the interest, or what represented the interest. The transactions appear to have received from them by Miss Paget were held by Finlay, J, to be from foreign securities. In my judgment he was right in so holding, and the appeals should be dismissed with costs.

In *Chibbett v. Joseph Robinson & Sons* 9 TC Rowlatt, J held:

> It seems to me that a payment to make up for the cessation for the future of annual taxable profits is not itself an annual profit at all (at p. 411, *Van Den Bergh's Report*). Consequently a payment for loss of a right to future profits is not profit for income tax purposes.

In *London & Thames Haven Oil Wharnes Ltd. v. Attwool, (HM Inspector of Taxes)* 45 TC 491, Buckley, J held:

> Now it is quite clear that if a source of income is destroyed by the exercise of the paramount right I have described, and compensation is paid for it, that is not income, although the amount of the compensation is the same sum as the total of the income that has been lost.

The consideration received in the instant case is for all three factors above and, for refraining from competition are therefore in my view capital in nature. Payments received for refraining from competition is capital *(Sun Newspapers (supra))*. On acceptance of the offer dated 31 July 1990 the respondent lost all rights in the partnership. Payments in respect of loss of rights is capital. *(Cohan's Executors (supra))*. Under para. 12 of the offer letter payments are proposed to be made to the respondent in respect of work in progress. These payments, although calculated by reference to work in progress, are capital. This view is based on the fact that this a method of calculation and is only a measure for the consideration for the respondent to cease being a partner, waive all his rights, take no court action and generally, to peacefully cease as partner. Therefore, the payments under para. 12 of the offer letter dated 31 July 1990 are not "income" but capital for the respondent. The sums are part and parcel of consideration for his cessation as a partner. The respondent's business in Ernst and Whinney ceased. The consideration was in respect of this cessation of the respondent's business in Ernst and Whinney. Clearly therefore, payments received for termination of business participation is capital.

As indicated the fact that the payments are made in relation to work in progress does not in any way make the payments income. In the case of *Barr, Crombie & Co Ltd v. Commissioners of Land Revenue* 26 TC 406 where the Lord President (Normand) said at pp. 411 and 412:

> It has been truly said that every case must be considered on its own facts, and that no legal criterion for distinguishing between capital payments and income payments is readily applicable. Therefore, though we have had a considerable citation of cases, I do not propose to refer to more than a few of them.
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> ...
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> Though each one of the distinctions may be in itself indecisive, and though each is open to criticism, yet *juncta juvant.* And where you have a payment for the loss of the contract upon which the whole trade of the Company has been built, where the expected profits of the contract are used to measure the loss of them for a period of future years, and where in consequence of the loss the Company's structure and character are greatly affected, the payment seems to me to be beyond doubt a capital payment. For these reasons therefore, I think that the question of law ought to be answered in the negative.

The case of *Daishowa (M) Wood Product Sdn. Bhd. v. Kepong Wood Products Co. Sdn. Bhd*. [1982] 2 MLJ p. 68 came to the same conclusion, that is, payment for loss of profits in the future are capital in nature. The case of *Paget v. Commissioners of Inland Revenue* 21 TC 677 is also to the same effect. In that case Miss Paget sold whatever rights she had (in certain coupons) to receive income in the future and the sales proceeds were held to be capital. In the respondent's case here the consideration is essentially for loss of rights and realisation of a partnership agreement. The payments received by the respondent in this case are not consultancy payments under cl. 3 of

the settlement agreement dated 1 July 1990. Clause 3 to the extent of the misdescription is null and void on grounds of public policy. There is no evidence that the respondent ever entered into consultancy agreements nor is there any evidence that consultancy services were in fact provided to Ernst & Young, the new partnership. The old partnership ceased on 31 July 1990 and consequently the question of providing consultancy services after 1 July 1990 to the ceased partnership does not arise. The respondent gave evidence that no consultancy agreement was entered into and no services were provided.

The accounting treatment in Ernst and Young does not bind the respondent. The accounting treatment is not within the control of the respondent. At any rate the accounting treatment is not conclusive. (See the case of *Ryan v. Asia Mill Ltd.* 32 TC 275. See also *Bernherd v. CIR* 13 TC 723). Again in *Bukit Yew Sdn. Bhd. v. DGIR* [1978] MLJ 379 where Harun, J (as he then was) said:

> The way in which a company keeps it accounts may be evidence of the company's intention but such evidence must be weighed against other evidence to decide the nature of the transaction: *Shadford (HM Inspector of Taxes) v. H. Fairweather* 43 TC 291.

It is permissible for the respondent to call in evidence to rebut the treatment in the accounts of Ernst and Young. See *Director General v. Ee Sim Sai* [1977] 2 MLJ 32, where a figure in Borang 14A was contradicted by other evidence. The agreed fact that the partner retired from the partnership of Ernst and Whinney on 31 July 1990 contradicts the apportionment to the respondent of profits of the new partnership of which he was not a partner. It is to be noted that the whole structure of Ernst and Whinney was changed in the new partnership of Ernst and Young. Appellant's submission does not address this point at all. In *Comptroller-General of Inland Revenue v. T* [1970] 2 MLJ 35, Gill FJ said:

> The sum paid to the respondent has been variously described as a payment on account of redundancy, a payment as compensation for loss of office, or a payment in accordance with his contract of employment. But the name or description given by the parties to the payment made is not necessarily decisive of the nature of the payment. Lord Greene Mr. R. in *Henriksen v. Grafton Hotel Ltd.* said:
>
> > For this purpose the first thing to do is to examine the nature of the payment, that is to say, the nature of the subject in respect of which the payment is made. In this connection the manner of the payment may be relevant as throwing light upon its nature. In many cases – and in my opinion this is one of them – the question will be found to answer itself once the true nature of the payment is ascertained.

As stated by Viscount Simon in *Commissioners of Inland Revenue v. Wesleyan and General Assurance Society*, "the question always is what is the real character of the payment, not what parties call it."

The onus of proof is on the respondent. But this is only on a balance of probabilities as this is a civil case. However, onus of proof does shift to the appellant. In *International Times & Ors. v. Leong Ho Yuen* [1980] 2 MLJ 86 it is thus stated:

> For the purposes of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co. v. Jatashankar Dossa and Ors.* AIR [1961] SC 1474, 1478 and *Raghavamma v. Chenchamma* AIR [1964] SC 136, 143). The first sense, signified by the expression burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal replied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slande*r 7th Edition paras 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to section 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.

The accounts and correspondence of Ernst & Young filed with the Inland Revenue Board cannot be relied on because:

(i) At p. 9 of exh. F – Inland Revenue Board's Bundle of Documents, the distribution statement for year of assessment 31 December 1990 shows the respondent and another respondent in case R2-14-11-98 as partners in Ernst and Young when the agreed fact is that the respondent withdraw from the partnership on 31 July 1990. The figures for the respondent shown there are, therefore, wrong;

(ii) Again at the same p. 9, the description "share of income" contradicts cl. 3 of the settlement agreement dated 31 July 1990 where it was agreed that the payments to the respondent would be described as "consultancy payments";

(iii) Since the respondent withdraw from the partnership on 31 July 1990, it is wrong in law to hold the respondent as partner to the year end 31 December 1990. Notations should have been made to the respondent that he retired on 31 July 1990. Indeed at p. 26 of exh. F, Inland Revenue Board's Bundle of Documents such notation for other retiring partners was shown;

(iv) Following (iii) above the lack of notation is discriminatory against the respondent;

(v) All the above comments also apply to p. 23, exh. F – Inland Revenue Board's Bundle of Documents;

(vi) Clause 3 of the settlement agreement dated 31 July 1990 is contrived to secure a tax advantage to Ernst and Young and therefore, the accounts of Ernst and Young in respect of the respondent clearly cannot be relied on.

(vii) No partner of Ernst and Young was called by the appellant to explain the errors in law in the presentation of the accounts for year ended 31 December 1990 and 31 December 1991.

(viii) Section 114(g), Evidence Act, is invoked for failure to call the partners concerned to explain their presentation and the statements made in Ernst and Young letter of 16 March 1995 at p. 86 of exh. F, Inland Revenue board's bundle of documents.

(ix) The letter of 16 March 1995 p. 86-87, exh. F (Inland Revenue Board's bundle of documents) from Ernst and Young is a gross misrepresentation of facts and is also materially inconsistent with the settlement agreement dated 31 July 1990 in the following particulars:

(a) The respondent withdraw from the partnership because they voted against the merger. This is evident in paras 11 and 12 of the settlement agreement dated 31 July 1990. The reason given in the said letter is wrong;

(b) The said letter speaks of share in the profits of the Firm up to 31 December 1991. This is contrary to the terms of the settlement agreement dated 31 July 1990;

(c) Tax liabilities cannot be agreed between taxpayers. That would depend on the nature of payment. At any rate, cl. 3 in respect of tax liabilities would only apply if there is liability;

(d) The letter says share of profits up to 31 December 1991 was agreed and yet in cl. 3 of the settlement agreement Ernst and Yong agreed to describe the payment as "consultancy payments". This is a contradiction;

(x) The appellant did not call any witness to explain the accounts of Ernst and Young in the Inland Revenue Board's bundle of documents, and therefore did not establish the correctness of the contents. In other words, the Inland Revenue Board did not lead any evidence on its documents;

(xi) The respondent gave evidence on the Ernst and Young accounts and showed where they were incorrect. In cross examination, no attempt was made to rebutt the inconsistency in Ernst and Young accounts. The respondent's evidence, is therefore not rebutted.

(xii) The figure for Dato' Hanifah bin Noordin at p. 7 of exh. F should read 490861 and not 672254. See also p. 22 of exh. D (supplementary respondent's documents). Also at p. 23 of exh. F, Dato' Hanifah bin Noordin figure of 991220 should not be there because he left on 31 July 1990;

(xiii) Clause 14 and 27 of the partnership deed in the agreed bundle of document (exh. B) allows a charge in partnership only if all partners agree;

(xiv) Even if Ernst and Young made losses, this sums under dispute must be made. And therefore, it could not be profits. Appellant's submission does not address this point at all.

The appellant on 22 November 1999 raised the following issues:

(a) that the bundle dated 7 May 1992 (p. 66, bundle 'F') from Chew Kong Seng was not considered by the special commissioners;

(b) that the settlement agreement was signed by the respondent;

(c) that the incorrectness of letter dated 6 May 1992 was not taken up by the special commissioners.

It is to be noted that the letter of 7 May 1992 (p. 66, Bundle 'F') was considered by the special commissioners at pp. 62-64 of the case stated, and the special commissioners concluded thus:

(a) The letters referred to above do contradict the agreement as submitted by the appellant. (at p. 64 of case stated);

(b) We concur with the submission of the appellant that the accounting treatment of EY does not bind the appellant and that the question is what is the real character of the payment, not what the parties called it. (at p. 64 of case stated).

The special commissioners supported their view with a list of cases (at p. 64-65).

It is contended that the appellant (Inland Revenue Board) did not call the writer of the letter of 7 May 1992 to give evidence on its truth. It is up to the appellant to prove what is asserted. It is up to the appellant to establish his case. See the case of *International Times* where it is stated thus:

> The first sense, signified by the expression burden of establishing a case and this rests through the trial on the party who assets the affirmative of the issue. (*International Times & Ors. v. Leong Ho Yuen* [1980] 2 MLJ 86).

Page 66, exh. F was not proved as a fact. Mr. Chew Kong Seng was not called as a witness. The failure of the appellant to call Mr. Chew Kong Seng to explain p. 66 of exh. "F" and other letters must be adversely taken against the appellant. (s. 114(g) Evidence Act). The said letter at p. 66 contradicts an

agreed fact, which is that the respondent retired on 31 July 1970. (paragraph 4 exh. 'A', statement of agreed facts). The special commissioners cannot go behind agreed facts. (See *Chua Lip Kong* where it is held):

> The Special Commissioners, in their Lordships view, were not entitled to go behind this statement. (*Chua Lip Kong v. Director-General of Inland Revenue* [1982] 1 MLJ 235)

It is solely for the special commissioners to accept or reject evidence. See *Chua Lip Kong* where it is held:

> It was not merely part of the evidence before them which they entitled either to accept or to reject as they thought fit. (*Chua Lip Kong v. Director-General of Inland Revenue* [1982] 1 MLJ 235)

It is also to be noted that the special commissioners considered all the correspondence in exh. F (director-general's bundle of documents) at pp. 31-35, and so the appellant's view that the special commissioners did not consider p. 66 of exh. F cannot be sustained. At p. 64 of case stated the special commissioners held that "the accounting treatment of EY does not bind the appellant and the question is what is the real character of the payment, not what the parties call it". It is submitted that the special commissioners took the correct approach. At any rate the accounting treatment contradicts an agreed fact that the respondent retired on 30 July 1990. The appellant agreed, in the statement of agreed facts, para. 4 that the respondent retired on 30 July 1990. Hence, it follows that the appellant now cannot at the appeal stage deny this fact. Page 66, exh. F was put to the respondents' witness, and the respondent said that the letter of 5 July 1990 is not correct and contradicts the fact that the retirement took place on 31 July 1990 and he had no share in the profits after 31 July 1990. There was no challenge to this at the special commissioners' level. The effect of such an absence of challenge is that the evidence is accepted and cannot be disputed in argument/submissions on the authority of *Aik Ming (M) Sdn. Bhd. v. Chang Ching Chuen* [1995] 3 CLJ 639; [1995] 2 MLJ 770. In *Bandar Utama City Corporation Sdn Bhd v. Director-General of Inland Revenue* [1998] 4 AMR 3921, the judgment of Denning MR to the following effect was quoted with approval:

> If the right to be heard is to be real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.

Indeed, p. 66 bundle "F" was corrected and contradicted by the respondent, and by an agreed fact (that the respondent retired on 31 July 1990) documents can be contradicted and corrected by a taxpayer. (See *Ee Sim Sai* [1997] MLJ 32. The appellant taxpayer is entitled to give evidence to establish the correct position).

The respondent did sign the settlement agreement. But it is for the courts to decide on the facts whether there is any tax to pay. Individuals cannot by agreement set aside the provisions of the Income Tax Act. The case stated at p. 28-35 sets out where the correctness of Ernst & Young accounts were disputed.

If the High Court finds that the special commissioners have sufficient facts to arrive at their decision, the High Court cannot reverse that decision even if the High Court may have arrived at a different decision. In other words, the High Court is "not a court of second opinion where there are reasons for the first". (As per Lord Radcliffe, in *Edwards v. Bairstow* 36 TC 207). In *St. Aubyn Estates Ltd. v. Strick (H.M. Inspector of Taxes)* 17 TC 412, this principle that a High Court judge should not interfere is stated thus:

> The only remaining question is whether there was any evidence on which they could find that, not whether I should have found the same thing myself; that is not the question. I can only interfere with their finding if there were no evidence upon which they could arrive at the conclusion which they did.

In the case of *Edwards (Inspector of Taxes) v. Bairstow & Anor.* [1956] AC 4, 36 TC 207 it is stated thus:

> ... and no judge is entitled to refuse to recognise the force of their decision merely because he can perhaps fasten upon one or more points with which he might not find himself in agreement. (per Wynn-Parry, J at p. 215, 36 TC 207 of the report).

For the reasons stated above, the special commissioners' decision, founded on facts established, is correct in law and the appeal is therefore hereby dismissed with costs.